UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

OFFICIAL PLAN COMMITTEE OF OMNIPLEX COMMUNCATIONS GROUP, LLC, Plaintiff,	)	
vs.	)	Case No. 4:04CV00477 ERW
LUCENT TECHNOLOGIES, INC., Defendant.	)	

MEMORANDUM AND ORDER

Before the Court is Plaintiff's Motion to Abstain and Remand [doc. # 8]. For the foregoing reasons, that motion is granted.

I. Background

Omniplex Communications Group, LLC (Omniplex) was one of the first competitive local exchange carriers authorized by the Missouri Public Service Commission to provide commercial telecommunication services in Missouri. In July 2000, it entered into an agreement with Lucent Technologies (Lucent) for the design, engineering, installation, and support of Pathstar Access Servers and related products. After an alleged failure by Lucent to provide the agreed products and services under the terms of the contract, Omniplex suffered significant financial losses, resulting in its filing for a voluntary petition in bankruptcy for reorganization under Chapter 11 of the Bankruptcy Code on February 28, 2001. In March of that year, the United States Trustee appointed a committee of Omniplex's creditors (the Creditors Committee) to represent the interests of all of Omniplex's unsecured creditors. That committee is comprised of Southwestern

Bell Telephone, L.P., Technology Applications, Inc., and MVP Communications, Inc.

On April 24, 2002, the United States Bankruptcy Court for the Eastern District of Missouri entered an order confirming the Joint First Amended Plan of Reorganization (Plan) filed by Omniplex and the Creditors Committee. The Plan created The Official Plan Committee of Omniplex Group, LLC (the Plan Committee) to conduct the post-confirmation liquidation of Omniplex, and appointed the following members: Dave J. Egan of SBC Industry Markets, Robert Steinberg of MVP Communications, Inc., Brent Hyde of Technology Applications, Inc., Michael McKay of Omniplex Communication Group, LLC, and The Disbursing Agent. Later, the Plan Committee designated John Vaclevec, CPA, of Williams Keepers as the Disbursing Agent.

In addition to creating the Plan Committee, the Plan provided that the Plan Committee would continue to operate with all the powers and rights of a debtor-in-possession under the Bankruptcy Code, vested all property of the bankruptcy estate in the Plan Committee, and gave the Plan Committee the powers of a bankruptcy trustee, as well as the exclusive right and authority to prosecute and defend all claims and causes of actions relating to the bankruptcy estate. Acting under its power to sue, the Plan Committee brought suit against Lucent in a Missouri state court for fraud. Lucent filed a notice of removal based on three separate grounds. First, it argued the parties were completely diverse, *see* 28 U.S.C. § 1331. Next, it claimed that removal was appropriate under 28 U.S.C. § 1452, which allows for removal whenever a district court would have jurisdiction over the claim under 28 U.S.C. § 1334. Finally, Lucent contended that removal was proper because the bankruptcy court expressly retained jurisdiction over this cause of action under the Plan.

The Plan Committee then filed the present motion to remand, arguing that the parties are

not completely diverse, and since they are not, the Court should refuse to hear the case under the mandatory abstention statute, 28 U.S.C. § 1334(c)(2), or the permissive abstention statute, *id.* § 1334(c)(1). The Plan Committee also asks the Court to remand on prudential grounds under 28 U.S.C. § 1452(b).

II. Discussion

Removal to federal court is appropriate only if the Plaintiff could have filed suit in federal court originally. *See* 28 U.S.C. § 1441(b). Once a party moves to remand a removed action to state court, the party opposing remand has the burden of establishing federal subject matter jurisdiction. *Green v. Ameritrade,* Inc., 279 F.3d 590, 596 (8th Cir. 2002). The Court is required to resolve all doubts about federal jurisdiction in favor of remand. *In re Business Men's Assurance Co. of America*, 992 F.2d 181, 183 (8th Cir. 1993).

A. Diversity jurisdiction

Lucent is a citizen of both Delaware, because it is incorporated there, and New Jersey, where its principal place of business is located. 28 U.S.C. § 1332(c)(1). Consequently, if the Plan Committee is a citizen of either one of those states, diversity jurisdiction does not exist. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Omniplex is a Delaware Limited Liability Company whose sole member is Omniplex Communications Corporation, which is incorporated in Delaware. The Plan Committee argues that because it is acting as a debtor-in-possession after Omniplex assigned that power to it, Omniplex's citizenship is the relevant one for establishing jurisdiction. Because both Omniplex and Lucent are Delaware citizens, the Plan Committee argues, complete diversity is lacking.

Lucent, on the other hand, contends that the Plan Committee is more analogous to a

bankruptcy trustee, and thus the individual citizenship of the members that represent the creditors on the Plan Committee--and not the citizenship of the creditors on the committee--control the Court's analysis. Since everyone agrees that the none of the individuals representing the companies on the Plan Committee are citizens of either Delaware or New Jersey, Lucent argues that the Court indeed does have diversity jurisdiction.

One problem with Lucent's position, even if the Court were to accept it, is that every court in the land has held that for diversity purposes, the citizenship of a bankruptcy trustee is the citizenship of the bankrupt or debtor, and not the citizenship of the trustee himself. Lucent correctly points out that the reasoning underlying this rule rests on a shaky foundation. The Supreme Court first announced the principle in *Bush v. Eliott*, 202 U.S. 477 (1906), but it reached its conclusion by interpreting a statute that has now been repealed. In that case, bankruptcy trustees sued a man and his company to recover monies the two owed the debtor before the debtor filed for bankruptcy. Because one of the trustees had the same citizenship as the defendants, the trial court dismissed the suit for lack of jurisdiction. In reversing, the Supreme Court ruled that what was then section 23 of the Bankruptcy Act (and was later codified at 11 U.S.C. § 46) clearly dictated that bankruptcy trustees were allowed to sue in federal court in the jurisdiction in which the debtor would have been entitled to sue but for the bankruptcy proceedings. *Id.* at 483. Thus, under that construction of the statute, the Supreme Court ruled that the citizenship of the trustee was "wholly immaterial." *Id.* at 484.

With binding Supreme Court authority on the books, the courts of appeal followed the *Bush* decision. *See, e.g.*, *Clarkson Co. v. Shaheen*, 544 F.2d 624, 627-28 (2d Cir. 1976). In 1978, however, Congress overhauled the federal bankruptcy law by passing the Bankruptcy

Reform Act of 1978, Pub. L. No. 95-598 § 401(a), 92 Stat. 2682 (codified in scattered sections of 11 U.S.C.) and repealed the jurisdictional provision upon which the *Bush* court relied. Nonetheless, at least one court of appeal and one district court recognize the current viability of the rule, *see Carlton v. Baww, Inc.*, 751 F.2d 781, 787 (5th Cir. 1985) and *Jackson Nat'l Life Ins. Co. v. Greycliff Partners, Ltd.*, 960 F. Supp. 186, 189 (E.D. Wis. 1997), and the leading federal practice treatise treats the rule that the citizenship of the bankruptcy trustee is irrelevant as a general proposition. 13B Charles Alan Wright et al., Federal Practice and Procedure § 3606 (2d ed. 1984).

The Court need not, however, decide whether the citizenship of the debtor or the citizenship of a hypothetical trustee controls in this case, because even assuming that the citizenship of each member of the Plan Committee must be examined, it is the corporation represented on the committee that matters, and not the corporation's representative. Lucent disagrees and compares the individuals representing the creditors on the committee to fiduciaries like an administrator of a decedent's estate, whose citizenship controls when he brings a suit on behalf of a deceased. The problem with Lucent's position is that a corporation can not act on its own. As a fictional entity created by statute, it must act through natural persons, such as directors, officers, or representatives. The Plan at issue here contemplated that the members of the Creditors Committee would be the members of the Plan. The order creating the Creditors Committee specified that the members of the committee were the corporations themselves. Of course, the corporation can not show up at a creditors' meeting without a person from the corporation representing it. It is not shocking, then, that individual members were named in the Plan. Unlike a personal representative, who is appointed because of a special skill or relationship

to the deceased, the only reason an individual was appointed to the Plan Committee was because of his connection to the creditor corporation. To put it another way, if Michael Steinberg leaves the employ of MVP Communications, it would be inappropriate for him to remain on the Plan Committee, and the Plan Committee would have to find another member. To take this scenario one step further, suppose Michael Steinberg is a citizen of New Jersey. Under Lucent's view, if the Plan Committee filed suit against Lucent today, there would be no diversity jurisdiction because Lucent is a New Jersey citizen. If, however, Mr. Steinberg quit working for MVP Communications tomorrow and the company had to substitute someone else on the committee and that person had neither Delaware nor New Jersey citizenship, the Court would have diversity jurisdiction if a suit was filed after Steinberg quit. Thus, Lucent surmises that the citizenship of the Plan Committee rises and falls on the possible fluctuation of members of the committee. The Court disagrees. The real parties in interest in this case are the creditors not their representatives who are only representatives because corporations can not act alone. Here, because two of the creditors on the Plan Committee, namely Ominplex and Southwestern Bell Telephone, L.P. are, like Lucent, citizens of Delaware, this Court lacks diversity jurisdiction.

B. Abstention

This is an action involving a purely state-law issue, and no issues of bankruptcy law are implicated. Thus, both parties agree that this action is only "related to" a case under Title 11, and does not "arise in," or "arise under," a Title 11 case. Congress, however, has directed federal district courts to abstain from hearing state-law claims where (1) the action could not have been heard in federal court but for the fact that it was related to a Title 11 case; and (2) an action is commenced, and can be timely adjudicated in a state court of competent jurisdiction. 28 U.S.C. §

1334(c)(2). Thus, while the Court has jurisdiction to hear the matter,[1] the Plan Committee argues that the Court must abstain from hearing the case under the mandatory abstention statute. In the alternative, it asks the Court to abstain "in the interest of comity with State courts or respect for State law" under 28 U.S.C. § 1334(c)(1). Finally, the Plan Committee asks the Court to apply 28 U.S.C. § 1452(b), which authorizes the Court to remand a case removed under § 1452(a)--which in turn, authorizes removal of actions where district courts have jurisdiction under § 1334--"on any equitable ground."

Lucent argues that abstention under either § 1334(c)(1) or 1334(c)(2) is inapplicable where the case has been removed under § 1452(a). Some courts have taken this position, reasoning that without a parallel state-court proceeding, there is nothing to abstain in favor of. *See, e.g.*, *In re Lazar*, 237 F.3d 967, 981-82 (9th Cir. 2001). A majority of courts, however, have rejected that position, ruling that the removed action was commenced in state court, and once remanded, could be timely adjudicated in state court. *See, e.g.*, *Christo v. Padgett (In re John Christo, Jr.)*, 223 F.3d 1324, 1331 (11th Cir. 2000) (remarking that the majority position comports better with the text of § 1334(c)(2) as well as Congress's intent); *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 929 (5th Cir. 1999) (noting that there is no textual support for the contrary view); *Robinson v. Michigan Consol. Gas. Co.*, 918 F.2d 579, 584 n.3 (6th Cir. 1990).

This court agrees with the Fifth, Sixth, and Eleventh Circuits. The text of 28 U.S.C. § 1334(c)(2) mandates that this Court not hear a case where a state court action is commenced, the

[1] 28 U.S.C. § 1452(a), in conjunction with 28 U.S.C. § 1334(b), authorizes the removal to federal district court of cases that either arise under the Bankruptcy Code, or are related to cases that arise under the Code.

only basis for the Court's jurisdiction is § 1334, the case is "related to" a title 11 case, the matter can be timely adjudicated in state court, and the plaintiff makes a timely motion. The action was originally commenced in state court, and the only reason there is no pending state proceeding is that Lucent removed it to this Court. The matter can be timely adjudicated in state court upon remand from this Court. This Court does not read § 1334(c)(2) to require parallel proceedings, but merely that an action be commenced in state court. Since one was, the Court must abstain and remand the case.

III. Conclusion

Because the Court has rejected diversity as a basis for this Court's jurisdiction, the Court must abstain and remand the case to state court under 28 U.S.C. § 1334(c)(2).

Therefore,

IT IS HEREBY ORDERED that Plaintiff's Motion to Abstain and Remand [doc. # 8] is **GRANTED** . This case is hereby **REMANDED** to the Circuit Court for Saint Charles County.

IT IS FURTHER ORDERED that all other pending motions are **DENIED as moot** .

Dated this 9th day of July, 2004.

/s/ E. Richard Webber
E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE